IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION NO.256 OF 1982

THE HON'BLE MR. JUSTICE Y.B. BHATT:

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1. Whether Reporters of Local Papers may be allowed to see the judgement?

2. To be referred to the Reporter or not?

3. Whether their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

Appearance:

Mr. K.V. Shelat, advocate for the petitioner.
Mr. B.R. Parikh, advocate for the respondent.

CORAM: Y.B. BHATT J.
Date of decision: 11-01-1996

JUDGEMENT

1. This is a revision under section 29(2) of the Bombay Rent Act (hereinafter referred to as 'the said Act') filed by the tenant-original defendant wherein the respondents are the landlords-original plaintiffs.

2. The plaintiffs had filed the suit in the Rent Court

constituted under section 28 of the said Act for a decree of eviction against the defendant-tenant on two grounds viz. (1) arrears of rent of more than six months and (2) reasonable and bonafide personal requirement of the landlord. The defendant-tenant contested the suit on both the grounds. It may also be noted here that it is not disputed that the tenant had raised a dispute as to standard rent by giving his reply to the suit notice within the prescribed period of 30 days and raising the dispute in the said reply. It may also be noted that in the suit notice the landlord had demanded arrears of rent on the basis that Rs.26/- per month was a contractual rent and Rs.5/per month were permitted increases. Thus, the landlord had claimed arrears of rent, so far as the suit notice is concerned, at the rate of Rs.31/- per month. In the dispute raised by the tenant in his reply to the suit notice, the tenant had accepted Rs.26/- per month as contractual rent, but had disputed Rs.5/- as an amount being due and payable to the landlord by way of permitted increases.

3. After recording evidence and appreciating the same, the trial court dismissed the suit of the landlord on both the grounds.

4. It may be noted here that so far as the ground of personal reasonable and bonafide requirement of the landlord is concerned, the trial court held on the appreciation of evidence on record that the landlord had failed to establish such requirement within the meaning of section 13(1)(g) of the said Act. The trial court further recorded a finding that even otherwise greater hardship would be suffered by the tenant in case the decree is passed, than the hardship which the landlord would suffer in case the decree is refused.

5. So far as the ground of arrears of rent is concerned, the trial court had raised the relevant issues at issue nos.1 and 2 which read as under:

[1] Whether the defendant is a tenant in arrears?

[2] Whether the plaintiff is entitled to decree for eviction on the ground of non-payment of rent?

While dealing with these two issues the trial court recorded findings against each of these issues as "not pressed".

5. The whys and wherefores of this finding gave rise to a controversy which has been very lightly and casually dealt with by the lower appellate court which shall be discussed hereinafter.

6. The trial court further decided the dispute as to

standard rent, by allowing Rs.5/- by way of permitted increases with effect from the date of the suit. In other words, the standard rent of the premises was determined at Rs.31/- per month from the date of the suit. In this context it requires to be observed that prior to the date of the suit the contractual rent agreed between the parties was only Rs.26/- per month, and Rs.5/- per month claimed by the landlord by way of permitted increases was merely a claim unilaterally made by the landlord, and not adjudicated upon by the court.

7. As a result of the aforesaid findings the landlord's suit for eviction was dismissed entirely on both the grounds.

8. The landlord, therefore, preferred an appeal under section 29(1) of the said Act.

9. Curiously, the appellate court has taken an unusual and unorthodox approach in its treatment to the entire appeal as such. It appears that the landlord had taken a ground in the memo of appeal that the issues pertaining to arrears or rent were not given up before the trial court, and that the observation of the trial court against the relevant issues as "not pressed" was an incorrect observation. It may also be noted here that the advocate appearing in the trial court on behalf of the landlord had expired since the judgement of the trial court, and the landlord was represented by another advocate who had filed the memo of appeal and conducted the appeal. Thus, the advocate who had in fact appeared before the trial court on behalf of the landlord was no longer available for confirmation or otherwise of the allegation to the effect that the issue of arrears was not pressed.

10. The lower appellate court did not directly deal with the controversy as to whether the issue was in fact not pressed or whether it is an erroneous impression carried by the trial court and hence the relevant observation made by it. Even without recording a finding in this context, the lower appellate court proceeded to examine the case as if such issues were open before the appellate court, and straightaway proceeded to apply the provisions of section 12(3)(b) of the said Act. The lower appellate court has moreover not assigned any reason whatsoever for straightaway applying section 12(3)(b) to the facts of the case, before considering the scope and impact of section 12(1) of the said Act. The lower appellate court straightaway concluded that in view of the provisions of section 12(3)(b), the tenant was required to deposit the rent regularly in respect of the period of pendency of the appeal, and that on the facts of the case, the tenant had not made such deposit on a regular basis, and that therefore the tenant had lost the protection of section

12(3)(b) of the said Act. The appellate court therefore reversed the decree of the trial court and by allowing the appeal, passed a decree for eviction against the tenant on the ground of arrears of rent.

11. At this juncture it may also be noted that the appellate court upheld the finding of the trial court on the question of reasonable and bonafide requirement of the landlord, and confirmed the dismissal of the landlord's suit on this ground.

12. On a perusal of the record, and on a perusal of the admitted facts found from the record of the case, it becomes obvious that the appellate court has failed to apply its mind to such facts, and has also failed to correctly appreciate the legal consequences of such facts. In this context it would be pertinent to note the relevant facts and circumstances established on the record.

13. The landlord had served the tenant with a statutory notice under section 12(2) of the Act. This notice of demand, demanding arrears of rent together with permitted increases is dated 1st October 1975 at Exh.16. It is pertinent to note that the said demand relates to the period 1st July 1973 upto 31st September 1975 i.e. for a period of 27 months, and the demand is in two parts - an amount of Rs.26/per month is claimed by way of contractual rent, and a further amount of Rs.5/- per month is claimed as permitted increases. This demand, therefore, as framed in the notice of demand would amount to Rs.868/-. It is also required to be noted that the claim of Rs.5/- per month by way of permitted increases merely constitutes a unilateral claim on the part of landlord by way of permitted increases, and the same obviously does not form part of the contractual rent. Moreover, it is well settled law that permitted increases would form part of the liability towards rent, provided that the same is agreed between the landlord and the tenant or the same has been adjudicated upon by the competent court under the Rent Act. Thus, the only legitimate demand which the landlord could have made on the date of the notice was in respect of the contractual rent of Rs.26/- per month.

14. The aforesaid notice of demand issued by the landlord dated 1st October 1975 was received by the tenant on 10th October 1975. Immediately thereafter the tenant replied to the aforesaid notice of the landlord by his reply dated 15th October 1975 (Exh.20). In the said reply the tenant contested the demand of Rs.5/- per month by way of permitted increases, but did not contest his obligation to pay Rs.26/- per month by way of contractual rent. He, therefore, on the very same day i.e. 15th October 1975 dispatched to the landlord a money

order (Exh.23) in the sum of Rs.728/-. It is also pertinent to note that this amount of Rs.728/- would cover the contractual rent for the period from 1st July 1973 to 31st October 1975, i.e. for one month more than the period contemplated by the landlord's notice of demand. In other words, the tenant also forwarded by the said amount the advance rent for the month of October 1975. This money order was accepted by the landlord without demur. This acceptance, or rather the unconditional acceptance, is obvious from the averments made in para 3 of the plaint itself. The said para 3 clearly states that the landlord has given credit to the tenant for the sum of Rs.728/- forwarded by the money order in question.

15. These facts clearly lead to the conclusion that so far as the contractual rent of Rs.26/- per month is concerned, the same was paid upto 31st October 1975. Thus, when the landlord filed a suit on 28th November 1975, there were admittedly no arrears, so far as contractual rent is concerned. So far as the landlord's claim of Rs.5/- per month by way of permitted increases is concerned, as already discussed hereinabove, the same constitutes merely a unilateral claim on the part of the landlord and the same cannot be said to be arrears of rent unless the same had been agreed upon between the parties or unless the same had been previously adjudicated upon by the competent court. As already stated hereinabove, the trial court did ultimately award the landlord this amount of Rs.5/per month by way of permitted increases, but this was only with effect from the date of filing of the suit. Thus, on the date of the suit notice, as also on the date of filing of the suit, the only obligation of the tenant was to pay the contractual rent at the rate of Rs.26/- per month. This obligation the tenant has fulfilled by forwarding the money order at Exh.23 constituting the full amount then due, and in fact making advance payment of the contractual rent for the month of October 1975. As already stated earlier, the landlord had accepted the same without demur. Under the circumstances the appellate court failed to appreciate that on the date of the suit the tenant was not in arrears of rent to any extent whatsoever.

16. It was perhaps under these circumstances, when it became apparent that there were no arrears of rent on the date of the suit, and consequently there was no cause of action, at least on the ground of arrears of rent, that the advocate for the landlord may have stated before the trial court that the relevant issues are not pressed. Furthermore it appears from the notes of arguments recorded by the trial court that the issues as to arrears of rent are not pressed inasmuch as there is no cause of action.

17. In the context of these facts, the appellate court was clearly in error in straightaway applying the provisions of section 12(3)(b) of the Act, and directly proceeding to examine whether the tenant had made regular deposits of rent in the court during the period of appeal. In this context the appellate court failed to appreciate the scope and impact of section 12(1) of the said Act, and further failed to appreciate that section 12(1) has an overriding effect over section 12(3), and further creates a jurisdictional barrier against the court passing a decree for eviction. Section 12(1) clearly bars the court from passing a decree for eviction where the tenant is shown to be ready and willing to pay the rent due. In the facts of the case, once it is found that the tenant is ready and willing to pay the rent, and moreover has in fact paid such rent, upto the date of filing of the suit, obviously section 12(1) would bar the court from passing a decree for eviction.

18. In this context it would be useful to refer to a decision of this court in the case of Abdulkarim Ahmed Turava (Coram: A.M. Ahmadi J. as he then was) reported at 1981 GLH 287. Paragraph 5 of the said decision deals with a fact situation, which closely parallels the one prevailing in the instant case. In the cited case the counsel for the landlord had urged that the tenant had committed default in depositing the rent regularly during the pendency of the appeal, and that therefore a decree under section 12(3)(b) of the said Act was justified. This contention was negatived by holding that once it is shown that the tenant had tendered the amount of rent due and payable within 30 days of the suit notice, it could not be said that the tenant was not ready and willing to pay the rent. The said decision further holds that on making such payment within 30 days of the suit notice, the landlord had no cause of action to institute a suit for eviction on the ground of non-payment of rent. Obviously, therefore, the landlord cannot claim possession on that ground and therefore section 12(3)(b) of the Act could not prevail over section 12(1) of the said Act.

19. Once the correct facts and circumstances are focused upon, it becomes obvious that the appellate court has failed to apply its mind in the correct perspective, and has ignored these facts established on the record for the purpose of applying the correct principles of law to the case. The decree passed by the appellate court, therefore, is not merely erroneous, but is also based upon a total misappreciation of the relevant facts established on record and non-application of the correct principles of law to such established facts. The appellate court decree is, therefore, required to be quashed and set aside, and it is accordingly so directed.

20. In the result, the present revision application is allowed, the decree of the appellate court is quashed and set aside and the decree of the trial court is sustained. Rule is made absolute accordingly with no order as to costs.

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